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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 418

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, and LOCAL UNION NO. 4372, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

Petitioners

vs

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF ON BEHALF OF PETITIONERS

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	1-2
QUESTIONS PRESENTED	2-3
STATUTE INVOLVED	3
STATEMENT	3-12
SUMMARY OF ARGUMENT	13-17
ARGUMENT	18-38
I. There was no Pleading, Allegation, Evidence or Finding in the Record to Sustain the Extension of the Board's Order to Cover the Employees of "Any Other Employer" Than the Primary Employer	18
II. The Decree of the Court of Appeals is Contrary to Controlling Precedent Established in Decisions of this Court and Heretofore Uniformly Followed by the Courts of Appeal	22
III. Compromise Settlements of Unfair Labor Practice Cases, and Orders of the Board Based Thereon Which Make No Findings That the Act Has Been Violated, Cannot be Used as the Basis of Future Prejudicial Conclusions in Other Cases, Such being Contrary to Public Policy Which Favors Compromise Settlements of Disputed Claims	28
IV. The Words "Or Any Other Employer" In The Board's Order as Enforced by the Court, Without Any Geographic Limitation and Without any Expression in the Court's Decree Delimiting the Effect of its Injunction, Constitute the Court of Appeals a Court of First Instance for the Trial of Unfair Labor Practices	32
CONCLUSION	39

APPENDICES (IN A SEPARATE VOLUME)

APPENDIX A—Pertinent Statutes	1a
APPENDIX B—Excerpt from Brief of Counsel for Labor Board in Court Below	6a

Appendices (Continued)

Page

APPENDIX C—Excerpt from Respondents' (Petitioners here) Brief in Court Below 10a

APPENDIX D—Full Text of Unreported Settlement Stipulation and Board Order in Indiana Bell Telephone Company Case 12a

APPENDIX E—Full Text of Unreported Settlement Stipulation and Board Order in Southern Bell Telephone Company Case 23a

APPENDIX F—Opinion, and Order Denying Rehearing, in Court Below 40a

APPENDIX G—Decision and Order of NLRB 41a

TABLE OF AUTHORITIES CITED

Court Cases

Central States Drivers Council v. National Labor Relations Board, 267 F. 2d 163, (CA-D.C., 1959) 39

Cone Brothers Contracting Company v. National Labor Relations Board, 235 F. 2d 37 (CA-5, 1956) 25

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, General Drivers and Helpers, Local 554, AFL-CIO v. National Labor Relations Board, 262 F. 2d 456 (CA-D.C., 1958) 24, 27, 32, 34

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Highway Drivers Local 107 v. National Labor Relations Board, ... F. 2d ....., 45 LRRM 2319 (CA-D.C., Dec. 23, 1959) 24-25, 27

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Truck Drivers Local Union 728 v. National Labor Relations Board, 265 F. 2d 439 (CA-5, 1959) 25, 27, 32

Court Cases (Continued)

Page

International Union of Operating Engineers, Local 150, AFL-CIO v. National Labor Relatoins Board, ... F. 2d ....., 45 LRRM 2324 (CA-D.C., Dec. 30, 1959) 25, 27

May Department Stores Company v. National Labor Relations Board, 326 U.S. 376, 66 S. Ct. 203 ..... 14, 23, 34

Morrison-Knudsen, Inc. v. National Labor Relations Board, 270 F. 2d 864, (CA-9, 1959) 25, 34

National Labor Relations Board v. Armco Drainage & Metal Products, 220 F. 2d 573 (CA-6, 1955) 25

National Labor Relations Board v. Cleveland-Cliffs Iron Company, 133 F. 2d 295 (CA-6, 1943) 24, 32

National Labor Relations Board v. Dallas General Drivers, etc., Local 745, 228 F. 2d 702 (CA-5, 1956) 32

National Labor Relations Board v. Express Publishing Company, 312 U. S. 426, 61 S. Ct. 693 ..... 14, 22, 32, 34

National Labor Relations Board v. Ford Motor Company, 119 F. 2d 326 (CA-5, 1941) 32

National Labor Relations Board v. Indiana and Michigan Electric Company, 318 U. S. 9, 63 S. Ct. 394 7

National Labor Relations Board v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 135, 267 F. 2d 870 (CA-7, 1959) 27

National Labor Relations Board v. Local 369, International Hodcarriers, Building and Common Laborers Union of America, 240 F. 2d 539 (CA-3, 1957) 24, 27

National Labor Relations Board v. Local 926, International Union of Operating Engineers, AFL-CIO, 267 F. 2d 418 (CA-5, 1959) 15, 25, 27, 30, 32

National Labor Relations Board v. McGraw & Co., 206 F. 2d 635 (CA-6, 1953) 26

Court Cases (Continued)

Page

National Labor Relations Board v. Nashua Manufacturing Corporation, 218 F. 2d 886 (CA-5, 1955) 25

National Labor Relations Board v. Springfield Building and Construction Trades Council, 262 F. 2d 494 (CA-1, 1958) 27

News Printing Company v. National Labor Relations Board, 231 F. 2d 767 (CA-D.C., 1956) 25

Republic Fire Ins. Co. of North America v. Weides, 81 U. S. 375, 14 Wall. 375, 20 L. ed. 894 ..... 15, 28

St. Louis Mining & Mfg. Co. v. Montana Mining Co., 171 U. S. 650, 19 S.Ct. 61, 43 L. ed. 320 ..... 15, 28

San Diego Building Trades Council v. Garmon, 359 U. S. 236 34

Williams v. First National Bank, 216 U. S. 582, 30 S. Ct. 441 ..... 15, 28

National Labor Relations Board Cases

Bitner Fuel Co., 92 NLRB 952, enf'd. 190 F. 2d 251 (CA-4) 14

Endicott Church Furniture, Inc., 125 NLRB #81 ..... 15, 29

Local 983, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (O. W. Burke Company), 115 NLRB 1123 14

Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (Valetta Trucking Company, 116 NLRB 842 26

Local 140, United Furniture Workers of America, CIO (Brooklyn Spring Corporation, 113 NLRB 815, enf'd. 233 F. 2d 539 (CA-2) 26

Puerto Rican Rayon Mills, Inc. 117 NLRB 1355 ..... 15, 28-29

United Mine Workers of America, District 31, (L.E. Cleghorn), 95 NLRB 546, enf'd. 198 F. 2d 389 (CA-4) cert. den. 344 U. S. 884 26

National Labor Relations Board Cases (Continued)

Page

United Mine Workers of America, District 2, (Mercury Mining and Construction Corporation), 96 NLRB 1389, enf'd. 202 F. 2d 177 (CA-6) 26

United Mine Workers of America (West Kentucky Coal Company), 93 NLRB 916, enf'd. 195 F. 2d 961 (CA-6), cert. den. 314 U.S. 920 26

Statutes

28 USC, Sec. 1254(1)

National Labor Relations Act, as amended (61 Stat. 136, 29 USC, Supp. V. Sec. 151, et seq): 3

Sec. 2 (3) 13

Sec. 7 ..... 8, 9, 14, 17,20, 21, 22, 23, 33, 34

Sec. 8 (b) (1) (A) 7, 20, 25, 34

Sec. 8 (b) (4) (A) 25

Sec. 10 (c) 22, 31

Sec. 10 (e) 2, 22

Miscellaneous

Administrative Rulings of National Labor Relations Board General Counsel, Case #S-739, November 27, 1958, 43 LRRM 1237 ..... 16, 36

In re Communications Workers of America (Indiana Bell Telephone and Telegraph Company) (Separate Appendix D) 12a

In re Communications Workers of America (Southern Bell Telephone and Telegraph Company) (Separate Appendix E) 23a

Twenty-third Annual Report of the National Labor Relations Board, 1958, p. 4 29-30

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (R. 105) is reported at 266 F. 2d 823. The Order denying Petitioners' Motion for Reconsideration and Rehearing (R. 113) has not yet been reported. The Decision and Order of the National Labor Relations Board (R. 65) is reported at 120 NLRB 684.[1]

JURISDICTION

The decree (R. 104) and opinion (R. 105) of the Court of Appeals were entered on May 14, 1959. Pe-

[1]References to the printed record in this Court are designated by "R". Petitioners' appendices in this Court are referred to as "App."; and references, if any, to the Board's printed appendix in the court below will be designated "B.A.". It has been stipulated between counsel that either party may make reference, if necessary, either in briefs or oral argument to portions of the record which have not been included in the printed record.

titioners' (Respondents below) Motion for Reconsideration and Rehearing (R. 106) requesting further modification of the Board's order, or, in the alternative, clarification *of the effect of the Court's decree*, was denied on June 26, 1959 (R. 113).

The petition for a Writ of Certiorari was filed on September 22, 1959. The petition was granted and the case was transferred to the summary calendar on November 16, 1959 (R. 113).

The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1) and Section 10(e) of the National Labor Relations Act, as amended. (29 U.S.C., Supp. V., Sec. 160(e); NLRA, Sec. 10(e), App. A, separate volume, p. 3a).

QUESTIONS PRESENTED

1. Is not a Labor Board Order too broad, which enjoins Respondents from restraining or coercing employees of the primary employer "or any other employer", when there is no pleading, allegation, evidence, or finding in the record that employees of any employer, other than the primary employer, were or could have been restrained by the conduct of the strikers?

2. Was it not error for the Court of Appeals to enforce a Labor Board Order which enjoins a parent national union and one of its 730 local unions from restraining and coercing employees of a primary employer or "any other employer" where there was no pleading, allegation, evidence or finding in the record to support extending the scope of the order to employees of "any other employer"; and where the alleged justification of the scope of the order consisted only of compromise settlements, containing no admission

of guilt, in two other isolated cases; and where such compromise settlements were injected into the case for the first time in the brief of the Board's General Counsel filed with the Court of Appeals to support its petition for enforcement?

3. Is not a Labor Board Order, enforced by the Court of Appeals, which enjoins a national labor union, operating from coast-to-coast with collective bargaining agreements with some 100 different employers, and one of its 730 locals from restraining or coercing employees of a primary employer "or any other employer" so broad in scope as to make the Court of Appeals, in possible future contempt proceedings, a court of first instance for the trial of other unrelated unfair labor practices in geographical areas outside of its jurisdiction?

4. Was it not error for the Court of Appeals to refuse to strike the words "or any other employer" from Paragraph 1 of the Labor Board Order, or, in the alternative, to issue a definitive construction of its decree, delimiting the breadth of effect which the Court intended its decree to have in the future?

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V., Sec. 151, et seq.) are set forth in Appendix A in separate volume, Petitioners' Appendices.

STATEMENT

The petitioner, Communications Workers of America, is a national labor organization, affiliated with the AFL-CIO, having approximately 260,000 members and 730 local unions throughout the United States and Canada. It is the collective bargaining representative

of the employees of approximately 100 employers from coast-to-coast, and has one or more collective bargaining agreements in effect with each. In addition, it conducts constant organizational campaigns among the employees of other employers. These contracts and organizational campaigns are administered through 9 geographical administrative districts, 4 nationwide administrative directors, and the local unions.[2]

In 1956 the Communications Workers of America had been recognized as the exclusive bargaining representative of the legally eligible non-supervisory employees of Ohio Consolidated Telephone Company for fourteen years (R. 72, 73).

The employees of the Company hold their membership in, and are directly represented in collective bargaining matters by, three CWA local unions — Local 4372, Local 4373, and Local 4374. The petitioner, Local 4372, has as its geographical area of jurisdiction, and has as its members, those non-supervisory employees of Ohio Consolidated Telephone Company working in the Portsmouth, Ohio, and contiguous operations of Ohio Consolidated (R. 73).

By letter dated May 11, 1956, Ohio Consolidated, by its Vice-President, R. N. Cole, notified J. A. Beirne, President of CWA, of its intent to terminate the existing collective bargaining agreement at its expiration on July 14, 1956. (R. 73; G.C.X. 4-A, R. 100, introduced, R. 72).

CWA President Beirne, by letter dated May 14, 1956, gave Ohio Consolidated counter-notice of termi-

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[2]The Constitution of CWA, Articles IV; V; IX, Section 2; XI; XIII; and Appendix A (fly leaf map) to such Constitution, which reveal the facts stated above, are in the Board's record as GCX3 (introduced in evidence, R. 72); but are not physically included in the printed record.

nation and requested negotiations for a new agreement containing named modifications. (R. 73; G.C.X. 4-B, R. 101, introduced, R. 72).

The bargaining committees of the Company and of its employees' representatives were unable to reach agreement on a new contract by the July 14 expiration date; and on July 15, 1956, the employees represented by CWA and its three local unions went on strike (R. 74).

Although the members of all three of the above named local unions went on strike at Ohio Consolidated on July 15, 1956, and their representatives participated in contract negotiations with Ohio Consolidated (R. 73), only Local 4372, of the three local unions, was a respondent before the Labor Board. No charges were filed against the other two CWA local unions (R. 80, 82); and there was no evidence or finding that members of the other two local unions participated in any of the untoward conduct alleged in the Board's complaint (R. 84, 99) or shown in evidence.

Ohio Consolidated Telephone Company is a wholly owned subsidiary operating company of the General Telephone Company (G.C.X. 31, R. 104), which operates a nationwide telephone system similar to that of the American Telephone and Telegraph Company (R. 76). General Telephone Company of Ohio, General Telephone Company of Indiana, General Telephone Company of Illinois (R. 76), General Telephone Company of Pennsylvania, General Telephone Company of West Virginia and General Telephone Company of the Southwest (R. 79) are all sister subsidiary operating companies to Ohio Consolidated, and all are part of the "General System" of companies (R. 76).

General Telephone of Ohio and Ohio Consolidated have some top managerial officials in common,[3] and throughout the strike supervisory employees of General Telephone of Ohio and other subsidiary companies of the General System were loaned to, and performed work for, Ohio Consolidated during the strike.[4] They were under the direction of Ohio Consolidated in the performance of these services; and the operating companies who loaned them to Ohio Consolidated billed Ohio Consolidated for their wages and salaries (R. 75).

These supervisory employees of General performed work for Ohio Consolidated normally done by the employees on strike. The only other employees who worked during the strike were Ohio Consolidated's supervisory force, several confidential secretaries to management officials who were not eligible for union representation, and one female employee who abandoned the strike and returned to work without interference or molestation from her fellow workers. They also performed some work normally done by strikers. None of these employees was deterred from continuing work by conduct of strikers. (R. 142; B.A. 114a, 115a; I.R., R. 59-64).

The Trial Examiner considered 27 specific incidents of misconduct alleged in the Board's complaint to have been committed by striking members of Local 4372 during the strike which lasted in excess of six months. The Board approved all of the Trial Examiner's find-

[3]For instance, Mr. Dick Zachman who is Public Relations Director for both of the sister companies. (I.R., R. 16; R. 75).

[4]The Intermediate Report names the following supervisory employees of General Telephone of Ohio who worked for Ohio Consolidated during the strike: District Plant Supt. Casteel; Plant Engineer Stratton; Chief Operator Pat Bauer; Construction Supervisors Ghearing, Foster and Seward; and Supervisor Wemple. In addition, other supervisors of the General System were working. (I.R., R. 35, 50. See also R. 74-79).

ings of fact, but reversed his conclusion that no unfair labor practices had been committed. The Board concluded that ten instances of misconduct by striking employees directed against supervisors, one instance of misconduct directed against the confidential secretary to the Vice-President of Ohio Consolidated, and portions of three instances of misconduct directed against supervisors, which were enmeshed with coercive misconduct on the part of the supervisors themselves, were violative of Section 8(b)(1)(A) of the Act, because such acts "tended" to restrain and coerce employees who may have heard of such misconduct.[5] (Board's Decision, Par. 1 and 2, R. 65-67).

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[5]Other conclusions of the Trial Examiner and rulings of the Board were as follows:

(1) He found that Company supervisors provoked all of the misconduct in seven instances and provoked part of the misconduct in three other instances; that the Company condoned and ratified the first act of threatened violence during the strike, which act was committed *against strikers* by employees of independent contractors (no violence by strikers against employees of independent contractors was shown in evidence); and that the District Plant Superintendent of General Telephone of Ohio, who was working for Ohio Consolidated, committed the first act of actual violence during the strike when he pushed a striker down an alley with an Ohio Consolidated truck, resulting in a "compressed vertebra" and other injuries to the striker. These findings were approved by the Board. (R. 13, 14, 25, 65).

(2) The Trial Examiner further found that President Williams and General Counsel Griffith of Ohio Consolidated employed private investigators to come to Portsmouth; that Public Relations Director Zachman (for both Ohio Consolidated and General Telephone of Ohio), Industrial Relations Director Lennberg, and either General Plant Manager Pratt or Division Manager Kimball *instructed* the investigators *"to remove four of the strike leaders from further strike activity in any manner they saw fit—by running them down with an automobile if necessary;"* that photographs of the four strikers were displayed to the investigators; that the investigators were discharged, in part, because they had not gotten the four strike leaders out of the picture; and that on the occasion of the discharge Division Manager Kimball stated to the investigators that, had they gotten the four strike leaders out of the picture, "the negotiations and the strike and everything would be disintegrated entirely." These findings of fact were tacitly approved by the Board. (Emphasis supplied). (R. 15-18, 68).

(3) Relying upon the decision of this Court in *NLRB v. Indiana & Michigan Electric Co.*, 318 U. S. 9, 18, 19, the Trial Examiner concluded that the foregoing facts were relevant and should be considered as to whether Ohio Consolidated had established a policy pattern of violence (R. 13) and had conspired to engage in illegal conduct which

Thus, the improper conduct found by the Board was limited to violence and threats of violence by strikers against persons working for Ohio Consolidated; and the only employees who were, or could have been, restrained or coerced in their Section 7 rights — that is, their right to work for Ohio Consolidated during the strike — were those employees who were working or may have desired to work. No evidence was introduced tending to show that employees of other employers, or the right to work for other employers, could have been affected.

Local 4372 was held responsible for these acts because its officers and members participated in them. Communications Workers of America was held responsible only derivatively because it approved and financially supported the strike of Local 4372 (R. 12, 59). There was no evidence that CWA or any of its officers instigated or approved any improper acts other than by the continuance of financial support to the strike and by the failure publicly to repudiate the strikers engaging in such conduct.

Upon these findings and conclusions, the Board's Order provided in Paragraph 1 that both CWA and Local 4372 "and their respective officers, representatives, agents and assigns:

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constituted an abuse of the Board's processes. (R. 18, 19). Upon the consideration of such facts, the Trial Examiner concluded that Ohio Consolidated had displayed contempt for the rights of its own employees and had abused the processes of the Board by threatening its employees with physical violence, by hiring investigators to engage in violence, and by engaging in actual violence against striking employees. (R. 64, 65).

While the Board apparently agreed with the conclusion that Ohio Consolidated restrained and coerced its employees by this conduct (Board's Decision, Par. No. 2, R. 68), it held that such evidence and findings were irrelevant and refused to consider their legal effect. (Board's Decision, Par. No. 3, R. 69).

> "1. Cease and desist from *in any manner* restraining or coercing employees of Ohio Consolidated Telephone Company *or any other employer* in the exercise of the rights guaranteed in Section 7 of the Act." (Emphasis supplied).

There was no pleading, allegation, evidence or finding in the record that employees of "any other employer" than Ohio Consolidated were, or could have been, restrained or coerced in their Section 7 rights; nor was there any pleading, allegation, evidence or finding that such restraint or coercion had been accomplished "in any manner" other than by acts and threats of violence on the part of striking members of Local 4372. Neither was there any pleading, allegation, evidence or finding that CWA had engaged in like or similar misconduct in other instances in the past or that CWA planned, or was engaged in a program, to extend such practices to employees of any other employer.

To avoid the expense of litigation, Petitioners (Respondents below) proposed to the Board that they would agree to a consent decree of enforcement if the words "in any manner" and "or any other employer" were stricken so that the Order would be restricted to the allegations, evidence and findings in the case. This proposal was declined and Petitioners resisted enforcement unless such modifications were made by the Court of Appeals.

In an effort to supply the deficiencies in the record, Counsel for the Labor Board, in their brief, alluded to two previous *unreported* orders of the Board, *based upon compromise settlement agreements* made between CWA and others of its affiliated local unions, the Labor Board, and Indiana Bell Telephone Company in

one case and Southern Bell Telephone Company in the other.

Local 4372 was not a party to either of the previous cases. *These unreported orders* of the Board *were not in evidence* and *the Board made no reference to them in its decision or order;* but it was contended that the Board could have relied upon such previous determinations and could have concluded that *both* Respondents below were in "general opposition to the purposes of the Act."[6]

Counsel for the Board in alluding to these previous unreported orders did not report to the Court that they were based upon *compromise* settlement stipulations, containing no admissions of prejudicial facts, and that, consequently, the orders of the Board, based upon the compromise settlements, contained no findings of fact that CWA or any other party to the compromises had violated the Act.[7]

As a result, Petitioners were forced to print as Appendices to their brief in the Court of Appeals the entire compromise settlement stipulations and orders of the Board in both the Indiana Bell and Southern Bell cases, in order to demonstrate to the Court of Appeals that no prejudicial conclusions could be based upon these matters, not of record, because they were, themselves, based upon privileged agreements and be-

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[6]The portions of the General Counsel's brief, filed on behalf of the Board, which inject the compromise settlements into the case *for the first time* and contain argument based thereon, are reprinted as Petitioners' Appendix B at page 6a in a separate booklet of appendices.

[7]Paragraph 8 of both the Indiana Bell and Southern Bell Compromise Settlement Stipulations contains the following express provision:

> "it is understood that the signing of this stipulation by Respondents does not constitute an admission by them that they have violated the Act." (App. 15a, 29a).

Accordingly, the Board made no finding of fact in either of the cases that the Respondents had violated the Act. (App. 19a, 35a).

cause they, themselves, made no prejudicial findings of fact that the Act had been violated. (Portions of Petitioners' Brief in the Court of Appeals, substantiating the foregoing, are reprinted as Petitioners' Appendix at page 10a in a separate volume. The Indiana Bell and Southern Bell Compromise Settlements and Board Orders are also reprinted in full as Appendices D and E in the separate volume at pages 12a, 18a, 23a, and 33a, respectively.)

Such was to no avail, however, for the Court of Appeals, after modifying Paragraph 1 of the Board's Order by striking the words "in any manner," enforced the words "or any other employer" (R. 104).

As aforesaid, there was no pleading, allegation, evidence or finding *in the record* upon which enforcement of the language "or any other employer" could be based. Therefore, while the summary opinion of the Court of Appeals does not indicate what substantive considerations the Court entertained,[8] it must necessarily have based this portion of its opinion and decree upon prejudicial conclusions drawn from these privileged, compromise settlements, which were not of record in the case, and upon the orders of the Board based upon them (which, however, had made no findings of fact that either of Petitioners had previously been responsible for violations of the Act).

By Motion for Reconsideration and Rehearing (R. 106) Petitioners again requested the Court of Appeals to delete the language "or any other employer" from the Board's Order, as enforced; or, in the alternative, that the Court issue a definitive ruling that its Decree

[8]The opinion does indicate, however, that the Court considered the briefs of the parties which contained this material, even though it was not in the record. (R. 105).

would not be construed in the future to apply to employees of employers other than those within the geographical area covered by the operations of Local 4372.

The Motion was denied on June 26, 1959, without clarification of the effect and scope which would be placed upon the Decree in possible future contempt proceedings (R. 113).

SUMMARY OF ARGUMENT

I

Contentions of the Board in the Court below that the broad language "or any other employer" was authorized (1) because supervisory employees of affiliated companies were "employees" of other employers within the meaning of Section 2(3) of the Act by virtue of the performance of non-supervisory work during the strike, and (2) because employees of other employers may have heard of the strikers' misconduct through the media of press and radio and were "put on notice that respondents were prepared to further their cause by unlawful acts" are without merit.

(1) The supervisory employees of sister companies of the "General System" were chosen to perform work normally done by strikers because they were *in fact* supervisors and, as such, could be depended upon to do the work of strikers. They were working under the direction and control of Ohio Consolidated, on Ohio Consolidated work, and at Ohio Consolidated expense, together with the regular supervisory employees of Ohio Consolidated. Under these circumstances, they were employees of Ohio Consolidated and of no other employer and they maintained their status as supervisory employees, as was recognized by the Board's General Counsel in the complaint.

(2) All of the acts of misconduct alleged, shown in evidence and found by the Board were directed toward supervisory employees of Ohio Consolidated while working on Ohio Consolidated work. We have not in this case challenged the dubious conclusion that such acts coming to the attention of strikers and non-striking "employees" of Ohio Consolidated may have

"tended" to restrain or coerce such employees in their Section 7 right of freedom of choice as to whether they should strike or discontinue striking. However, it was not shown that the employees of any other employer were requested to work for Ohio Consolidated, or that they had any right to work for Ohio Consolidated. The strike did not involve any other employer and the strike activity was not directed at the employees of any other employer. Under these circumstances the Section 7 rights of employees of other employers were not involved in the strike or the strike activity; and therefore such other employees could not have been restrained or coerced in the exercise of the Section 7 right to strike or not strike at a place of employment where no strike existed.

(3) There was therefore no evidence to show any tendency for the employees of other employers to be restrained or coerced in the exercise of their Section 7 rights and no such finding was made by the Board. Neither was there any allegation, evidence or finding in the record of a past history of similar violations by Petitioners in other cases, nor of an intention on their part to extend such violations to other employers in the future.

Consequently, there is nothing in the record to authorize or justify the extension of the Board's Order to the employees of "any other employer" than those of the primary employer.

II

Under the foregoing facts, the decisions of this Court in *NLRB v. Express Publishing Co.*, 312 U.S. 426, 434, 435, 438, and in *May Department Stores Co. v. NLRB*, 326 U.S. 376, 390, 393, and the decisions

of the circuit courts which have heretofore uniformly followed those precedents, dictate that the Court of Appeals was in error in refusing to strike the language "or any other employer" from the Board's Order as enforced.

Only by basing prejudicial conclusions upon compromise settlements containing no admissions of guilt, which were first injected into the case in the brief of Counsel for the Board in the Circuit Court and which were not in the record or mentioned by the Board in its decision, can the decree enforcing such language be sustained.

III

This court and all other courts have always held that compromise settlements of disputed issues, containing no admissions of guilt, cannot be given prejudicial effect in future litigation because such compromises are based upon valuable consideration and are favored by public policy. *Williams v. First National Bank*, 216 U.S. 582; *St. Louis Mining and Manuf. Co. v. Montana Mining Co.*, 171 U.S. 650; *Republic Fire Ins. Co. v. Weides*, 14 Wall. 375, 81 U.S. 375.

The Board has likewise heretofore held that compromise settlements of unfair labor practice cases do not constitute proof that any unlawful acts occurred or that the Act has been violated. *Puerto Rican Rayon Mills, Inc.*, 117 NLRB 1355, 1364, fn. 7; *Endicott Church Furniture*, 125 NLRB #81, fn. 2.

The case of *NLRB v. Local 926, Int. Union of Operating Engineers, AFL-CIO*, 267 F. 2d 418, 420 (CA-5, 1959) is on all-fours factually with the instant case. Petitioners feel that the considerations of public policy announced by the Fifth Circuit in that case, in

refusing to permit the Board to repudiate compromise settlements "solemnly entered into" by it and in striking the language "or any other employer" sought to be justified by such compromises, should be controlling in this case.

IV

(1) Local 4372 was not even a party to the two previous cases, the compromise settlements in which are sought to be used prejudicially against it in this case.

(2) The operations of Local 4372 are confined to the representation of the employees of only one employer — Ohio Consolidated, and to one community — Portsmouth, Ohio. The language "or any other employer" authorizes the Court of Appeals to be a labor court of first instance in contempt proceedings and to adjudicate factual questions of agency involving the responsibility of Local 4372 for the acts of other local unions in widely divergent geographical areas.

(3) Communications Workers of America is a national organization having 730 affiliated local unions and dealing with the employees of over 100 employers; but it is not an omnipotent presence with the capacity, or ability, in every instance, to control in advance local union officers and members. Here it was held responsible only derivatively because it approved a strike and provided financial support to it — not because it instigated or approved the unlawful acts. The fact that it does not approve such acts and has no general policy to condone them was recognized by the Board's General Counsel in Administrative Ruling, Case #S-739, November 27, 1958, when he found that CWA was not responsible for, but had repudiated,

such conduct. The Court's decree, however, authorizes CWA to be held in contempt upon such principles of derivative responsibility because of unrelated acts of local union officers and members anywhere in the United States, and the Court of Appeals in entertaining any such adjudication would thereby become a labor court of first instance in contempt proceedings.

(4) The broad order of the Board in this case is designed to control violence, as such, because no restraint or coercion of employees of "any other employer" in the exercise of their Section 7 rights was shown. This police function was left by Congress to the primary responsibility of the states. Such an order, enforced by court decree, threatens to make a police magistracy of the Court of Appeals.

ARGUMENT

I

THERE WAS NO PLEADING, ALLEGATION, EVIDENCE OR FINDING IN THE RECORD TO SUSTAIN THE EXTENSION OF THE BOARD'S ORDER TO COVER THE EMPLOYEES OF "ANY OTHER EMPLOYER" THAN THE PRIMARY EMPLOYER.

Before the Court of Appeals, counsel for the Board made a sophistical effort to justify the language "or any other employer" by contending (1) that the supervisory employees working for Ohio Consolidated were carried on the payroll of other companies and were performing non-supervisory work during the strike, and (2) that employees of other employers may have heard of the conduct of Ohio Consolidated's striking employees through the media of press and radio and may have thereby been restrained and coerced in some vague and unspecified manner by being "put on notice that respondents were prepared to further their cause by unlawful acts." (Board's Brief, App. B, pp. 8a, 9a, in separate volume of appendices.)

(1) From the beginning of the strike on July 15, 1956, until the time of the hearing before the Trial Examiner in January, 1957, Ohio Consolidated Telephone Company continued to operate with clerical, confidential, professional, and supervisory employees of Ohio Consolidated and supervisory employees of other affiliated operating companies of the "General System," performing the work of the rank and file employees who were on strike. (R. 74-79, 142; B.A. 114a, 115a; I.R., R. 59-64).

The supervisory employees of other affiliated operating companies were working for Ohio Consolidated, doing the work normally done by Ohio Consolidated's

striking employees, and they were working under the direction and control of the Ohio Consolidated Telephone Company. Further, the operating companies were billing Ohio Consolidated for the wages and salaries of the supervisory employees working for Ohio Consolidated; so that, in fact, Ohio Consolidated was paying the wages and salaries for the work which was being performed for it. These employees were not performing any work for, or under the direction and control of, or at the expense of, the other operating companies who loaned them to Ohio Consolidated (R. 75).

The supervisory employees of other operating companies, therefore, at the time were, in fact, employees of Ohio Consolidated Telephone Company and occupied identically the same legal status as did the regular supervisory employees of Ohio Consolidated who were performing the work of rank and file employees during the strike.

Apparently, the Board's General Counsel recognized this at the time the complaint was isued as every specific allegation of his complaint (R. 87-92, 99) is restricted to charges of interference with "supervisory employees of the Employer" in the performance of their assigned duties.

Since these persons were working under the direction and control of Ohio Consolidated, on Ohio Consolidated's work and at Ohio Consolidated's expense, the fact that they had been loaned to Ohio Consolidated and might return to their regular employer at the termination of the strike would not change their status of being employees of Ohio Consolidated at the time.

Furthermore, they were supervisory employees who are *not* "employees" under the statutory definition of that term.[9] Employers as a usual and normal matter assign non-supervisory work to supervisors during strikes, and it is significant that the *only* employees of other sister companies used by Ohio Consolidated during the strike *were* supervisory employees. It is apparent that the reason that only they were used was that they *were* in fact supervisors and could be depended upon by the General System to perform, during the strike, the work normally done by non-supervisory strikers. The emergency assignment of this work to them is entirely consistent with their supervisory status and it would not have been assigned to them had they not occupied this status.

Consequently, the performance of non-supervisory work by supervisors during the strike does not convert their supervisory status to the status of "employee" within the statutory definition, but only confirms their status as a part of management.

(2) As aforesaid, of the fourteen acts, or threats, of violence found by the Board to have been committed by strikers during the three months following the beginning of the strike, all except one incident involved supervisory personnel.[10]

The Board justifies its conclusion that Section 8 (b) (1) (A) was violated (and employees restrained or coerced in their Section 7 rights) by striker misconduct directed against supervisors upon the basis that the

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[9]See Section 2(3) of the Act (29 U.S.C., Supp. V, Sec. 152(3), App. A, p. 1a.

[10]The one exception involved Maynard, confidential secretary to Company Vice-President Cole, who was ineligible for inclusion in the bargaining unit and occupied a status very similar to that of supervisory employees.

circumstances were such that strikers probably heard of the misconduct "and thereby tended to be restrained or coerced in their own right to continue or discontinue striking as they wished." (Board's Decision, Par. #2, R. 67).

While the Board's determination that strikers may in this manner restrain or coerce themselves and fellow strikers seems to be of doubtful validity, such is not here challenged and petitioners have accepted the ruling of the Board in this regard for the purposes of this case.

However, a finding that employees of Ohio Consolidated may have heard of misconduct, directed against Ohio Consolidated supervisors performing Ohio Consolidated work, and thereby tended to be restrained or coerced in their right to continue or discontinue striking is matter distinct and different from a finding that employees of some other employer, not involved in the dispute, were restrained or coerced in their own Section 7 rights.

Section 7 protects the right of employees to engage in concerted activity for purposes of collective bargaining, or to refrain from such activity. (29 U.S.C. Supp. V., Sec. 157, App. A, p. 2a). This record does not show, either by allegation or evidence, that the Section 7 rights of the employees of any other employer were in any manner related to or affected by the labor dispute and strike at Ohio Consolidated. Therefore, the fact that employees of other employers may have heard by newspaper, radio or word of mouth, of misconduct of Ohio Consolidated strikers, directed toward Ohio Consolidated supervisors performing Ohio Consolidated work, could not in any manner restrain or coerce

them in the exercise of their own unrelated Section 7 rights in connection with their employment with other employers where no strike existed.

II

THE DECREE OF THE COURT OF APPEALS IS CONTRARY TO CONTROLLING PRECEDENT ESTABLISHED IN DECISIONS OF THIS COURT AND HERETOFORE UNIFORMLY FOLLOWED BY THE COURTS OF APPEAL

This Court has, heretofore, in several decisions had occasion to consider and define the permissible breadth and scope of cease and desist orders of the Labor Board, and enforcement decrees of the Courts of Appeals, issued pursuant to Sections 10(c) and 10(e) of the National Labor Relations Act.[11]

The basic construction which has been adhered to in all subsequent decisions, is found in *NLRB v. Express Publishing Co.*, 312 U.S. 426, 434, 435, 61 S. Ct. 693, 8 LRRM 415, where the Court said:

> "Congress has itself afforded a guide pointing to the appropriate limits of the order which the Board is to make in restraining unfair labor practices. By its definition and classification of unfair labor practices in the statute it is shown that they are not always so similar or related that the commission of one necessarily admits of an order restraining all.
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> * * *
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> "In view of the authority given to the Board by 10(c) carefully restricted to the restraint of such unfair labor practices as the Board has found the employer to have committed, and of the broad language of 10(e) authorizing the courts to modify the order of the Board wholly or in part, we

[11]Sections 10(c) and 10(e) are reprinted in Appendix A. See separate volume, Petitioner's Appendices, pp. 2a, 3a.

> can hardly suppose that Congress intended that the Board should make or the court should enforce orders which could not appropriately be made in judicial proceedings. * * * *In the light of these provisions we think that Congress did not contemplate that the courts should, by contempt proceedings, try alleged violations of the National Labor Relations Act not in controversy and not found by the Board and which are not similar or fairly related to the unfair labor practice which the Board has found.*" (Emphasis supplied).

In *May Department Stores Co. v. NLRB*, 326 U.S. 376, 390, 393, 66 S. Ct. 203, 17 LRRM 643, the Court quoted its *Express Publishing Company* ruling as follows:

> " 'To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past.' P. 437."

In that case the Court stated further:

> "While contempt proceedings can be instituted only by the Board and in the public interest, the possibility of contempt penalties by the court for future Labor Act violations adds sufficient additional sanction to make material the difference between enjoined and non-enjoined employer activities."

In both of these decisions the Court set aside the portion of the Board's order not supported in the evidence. In them, as in the present case, there was no evidence or finding in the record of a past course of conduct which authorized an extension of the injunction against future violations beyond the parties involved in the controversy shown in evidence.

The Amendments to the Act, subsequent to these decisions, have made no changes which alter them as precedents and they have heretofore been uniformly followed by all of the Courts of Appeals, including the Sixth Circuit.

In *NLRB v. Local 369, International Hodcarriers, Builders and Common Laborers Union of America*, 240 F. 2d 539, 39 LRRM 2377 (CA-3, 1957), the Third Circuit quoted the *Express Publishing Company* case, as follows:

> " 'So far as respondents' past conduct may be thought to have had any effect on the rights guaranteed by Section 7, such consequences would be effectively prevented by the prohibition of such an order without drawing it so broadly as to forbid all other unrelated unfair labor practices.' " (312 U.S., at p. 438).

In the recent case of *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, General Drivers and Helpers, Local 554, AFL-CIO v. National Labor Relations Board*, 262 F. 2d 456, 43 LRRM 2197 (CA-D.C., 1958) the Court stated:

> "But we believe it more appropriate to follow the reasoning of the Supreme Court in *Express Publishing*, that a court of appeals should not become a labor court of first instance by virtue of contempt powers. We therefore agree with the Sixth Circuit that the better view is 'that the order should not go beyond the evidence supporting the unfair labor practices alleged.' " (Quoting *NLRB v. Cleveland-Cliffs Iron Co.*, 133 F. 2d 295, 302, 12 LRRM 550 (CA-6, 1943).

And in *International Brotherhood of Teamsters, etc., Highway Drivers Local 107 v. NLRB*, ...F. 2d

....., 45 LRRM 2319 (CA-D.C., December 23, 1959), the same Court said:

> "We think the Board's order should be limited to the employees of the Virginia-Carolina Company, with respect to when it was proved the union had violated Sections 8(b)(1)(A) and 8(b)(4)(A). The words 'or any other employer' in paragraph 1(a) of the Board's order, and the words 'or by like or related conduct restraining or coercing employers doing business with Virginia-Carolina Freight Lines, Inc.' in paragraph 1(b) will be stricken from the order."

To the same effect is *International Union of Operating Engineers, Local 150, AFL-CIO, v. NLRB*, ...F. 2d....., 45 LRRM 2324 (CA-D.C., December 30, 1959).

See also:

NLRB v. Local 926, Int. Union of Operating Engineers, 267 F. 2d 418, 420, 44 LRRM 2200 (CA-5, 1959);

Morrison-Knudsen, Inc. v. NLRB, 270 F. 2d 864, 44 LRRM 2680 (CA-9, 1959);

Int. Brotherhood of Teamsters, etc., Local 728 v. NLRB 265 F. 2d 439, 43 LRRM 2813 (CA-5, 1959);

Cone Brothers Contracting Co. v. NLRB, 235 F. 2d 37, 38 LRRM 2318 (CA-5, 1956);

NLRB v. Armco Drainage & Metal Products, 220 F. 2d 573, 35 LRRM 2536 (CA-6, 1955);

News Printing Co. v. NLRB, 231 F. 2d 767, 37 LRRM 2656 (CA-D.C., 1956);

NLRB v. Nashua Mfg. Corp., 218 F. 2d 886, 35 LRRM 2371 (CA-5, 1955);

NLRB v. McGraw & Co., 206 F. 2d 635, 641, 32 LRRM 2220 (CA-6, 1953).

The Board also, until quite recently, considered itself bound by these precedents of this Court, and all Board orders, except one, which have been cited by its counsel[12] in support of the language "or any other employer" have restricted the geographical area in which the order was to be effective, to the area in which the primary actor (which here would be Local 4372) operates and in all of them (except *O. W. Burke Company*, where such was clearly implied from the facts recited) the Board made a *specific* finding that the Respondent intended to extend its coercive conduct to employees of other employers in *that* geographic area.

The one exception is the case of *Local 140, United Furniture Workers of America, CIO (Brooklyn Spring Corporation)* 113 NLRB 815, 816, enforced 233 F. 2d 539 (CA-2). It appears from the Second Circuit decision that the language "or any other employer" was not challenged on appeal. Furthermore, the *only* respondent in that case was a local union. Hence that case is not authority for the use of such language against a parent union whose operations are nationwide in scope and which may be derivatively responsible for the acts of hundreds of local unions.

In *Bitner Fuel Co.*, 92 NLRB 953, 955, enforced 190 F. 2d 251 (CA-4), the Board itself specifically held

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[12]Local 294, *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (Valetta Trucking Company)*, 116 NLRB 842, 846; *United Mine Workers of America, District 2, (Mercury Mining and Construction Corporation)* 96 NLRB 1389, 1392, enforced 202 F. 2d 177 (CA-6); *United Mine Workers of America, District 31 (L. E. Cleghorn)*, 95 NLRB 546, enforced 198 F. 2d 389 (CA-4, certiorari denied 344 U. S. 884; *United Mine Workers of America (West Kentucky Coal Co.)*, 93 NLRB 916, 919, enforced 195 F. 2d 961 (CA-6), certiorari denied 314 U. S. 920; *Local 983, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (O. W. Burke Company)*, 115 NLRB 1123, 1125.

that such broad orders would be issued only where "the record clearly indicated that the respondent * * * was engaged in a planned program to apply the same technique to all" other employers "within its jurisdiction."

More recently, however, there is much evidence that the Board has abandoned the policy of making its orders conform in scope to the pleadings, evidence and *adjudicated* history, and is now following the policy of making all orders, at least those against unions, broad and general in their coverage.[13] The courts, however, have continued to follow the precedents established by this Court and have restricted the scope of Board orders to the pleadings and evidence in the case[14] or to historical patterns of unlawful conduct *expressly* found by the Board upon the basis of *adjudicated* cases, repetition of which is specifically found to be threatened.[15]

In this case, unless the unreported orders of the Board in the Indiana Bell and Southern Bell cases[16] (which were not put in evidence and to which the Board made no reference in its decision and order), are to be considered, there is no justification for a departure from the unbroken line of precedent in this

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[13]*E.g.: International Union of Operating Engineers, Local 150, AFL-CIO, v. NLRB,* _____ F.2d _____ (CA-DC, December 30, 1959), *supra; Int. Brotherhood of Teamsters, etc., Local 107 v. NLRB,* _____ F.2d _____ (CA-DC, December 23, 1959), *supra; NLRB v. Local 926, Int. Union of Opr. Engineers,* 267 F.2d 418 (CA-5, 1959), *supra; Int. Bro. of Teamsters, etc., Local 728 v. NLRB,* 265 F.2d 439 (CA-5, 1959), *supra; Int. Bro. of Teamsters, etc., Local 554 v. NLRB,* 262 F.2d 456 (CA-DC, 1958), *supra; NLRB v. Local 369, Int. Hodcarriers, Builders, etc. Union,* 240 F.2d 539 (CA-3, 1957), *supra.*

[14]See cases in footnote 13, *supra.*

[15]*E.g.: NLRB v. Int. Bro. of Teamsters, etc., Local 135,* 267 F.2d 870, 44 LRRM 2291 (CA-7, 1959); *NLRB v. Springfield Building and Construction Trades Council,* 262 F.2d 494, 43 LRRM 2320 (CA-1, 1958); cases cited, footnote 12, *supra.*

[16]Appendices D and E, separate volume, pp. 18a and 33a.

Court and the Courts of Appeal; and the language "or any other employer" should be stricken from the Board's order enforced by the Court of Appeals.

III

COMPROMISE SETTLEMENTS OF UNFAIR LABOR PRACTICE CASES, AND ORDERS OF THE BOARD BASED THEREON WHICH MAKE NO FINDINGS THAT THE ACT HAS BEEN VIOLATED, CANNOT BE USED AS THE BASIS OF FUTURE PREJUDICIAL CONCLUSIONS IN OTHER CASES, SUCH BEING CONTRARY TO PUBLIC POLICY WHICH FAVORS COMPROMISE SETTLEMENTS OF DISPUTED CLAIMS

One of the most basic and traditional principles of public policy inherent in our judicial system is that compromise settlements of litigation are to be encouraged, and, hence, that offers and agreements of compromise cannot be construed to be admissions or used as a basis for prejudicial conclusions in future legal proceedings. *Williams v. First National Bank*, 216 U.S. 582, 30 S. Ct. 441, 54 L.ed 625; *St. Louis Mining and Manufacturing Co. v. Montana Mining Co.*, 171 U.S. 650, 19 S.Ct. 61, 43 L. ed. 320; *Republic Fire Ins. Co. of N. A. v. Weides*, 81 U.S. 375, 14 Wall, 375, 20, L. ed. 894.

An admission of *fact* in such an offer or agreement can be the basis of a conclusion, but *the matter compromised* cannot be relied upon as the foundation for future conclusions.

This fundamental concept has been expressly recognized by the Board on at least two previous occasions.

> "The settlement agreement and a consent decree which arises from the settlement agreement do not have legal significance or probative value in

establishing that the incidents or that the violations of the Act in fact occurred." *Puerto Rican Rayon Mills, Inc.*, 117 NLRB 1355, 1364, fn. 7.

"A settlement agreement does not establish that the conduct in question occurred or that it constituted a violation of the Act." *Endicott Church Furniture, Inc.*, 125 NLRB #81, fn. 2.

The Board likewise recognized this principle in its orders in the Indiana Bell and Southern Bell cases by entering findings of fact upon the stipulations of fact made by the parties and *by its failure* to enter any findings that CWA had violated the Act. Thus it found as a matter of fact in each case that the controversy affected interstate commerce and that CWA and the affiliated locals involved were labor organizations; but it made no findings in either case on the subject matter of compromise — that is, guilt of the unfair labor practices charged.

Compromise settlements of unfair labor practice cases are based upon valuable consideration both to private parties and to the Board. *Twenty-third Annual Report of the National Labor Relations Board*, 1958, p. 4,[17] dramatically illustrates the importance to the Board and its General Counsel (and, of course, to the general public) of the ability to dispose of cases by settlement when it states:

"The General Counsel's staff in the field offices closed 6,654 unfair labor practice cases without formal action, and issued complaints in 822 cases.

"Of the 6,654 unfair labor practice cases which the field staff closed without formal action, *725, or 11 percent, were adjusted by various types of*

[17]At this writing the annual report of the Board for the fiscal year ending June 30, 1958, is the latest available annual compilation.

> *settlements;* 2,242 or 34 percent, were administratively dismissed after investigation. In the remaining 3,687 cases, or 55 percent of the cases closed without formal action, the charges were withdrawn; in many of these cases *the withdrawals actually reflected settlement of the matter at issue between the parties.*"

Thus, it can be concluded that at least one-fourth to one-third of the entire business of the General Counsel's office was transacted and disposed of by agreement and compromise. Without the ability to close cases by settlement, hundreds of additional professional employees and millions more in dollars would be required to administer the Act annually.

Similarly, millions of dollars are saved annually by private parties through compromise and settlement of unfair labor practice cases. However, if these parties are unable to know that compromise settlements with the Board will be non-prejudicial, they will not long continue this practice.

Nothing could more effectively undermine the administration of the Act than for the courts to permit the Board and its General Counsel to breach this most basic concept of public policy and of honesty and good faith by using compromise settlements, which contain no admissions of guilt, as a basis for prejudicial conclusions in future cases.

This was recognized by the Court of Appeals for the Fifth Circuit in *NLRB v. Local 926, Int. Union of Operating Engineers, AFL-CIO,* 267 F. 2d 418, 420, 44 LRRM 2200 (May 26, 1959), the facts of which are, in substance, identical to those in the present case. In that case, as in the present one, counsel for the

Board relied upon compromise settlements to sustain a broad order which was without support in the record.

In reaching the opposite conclusion from that reached by the Sixth Circuit in this case, the Fifth Circuit expressed most appropriately the views which Petitioners regard to be legally and morally correct and which they feel should control the disposition of this case as well. For this reason, the pertinent portions of the Fifth Circuit decision are set forth, in full, in footnote 18, below.

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[18]"The Union makes two contentions. * * * Second, the Union contends that the facts in the case do not justify an order as broad as the one issued by the Board.

* * *

"II. The scope of the order is a different matter. The order, in part, requires the Union to:

"I. Cease and desist from engaging in, or inducing or encouraging the employees of any employer, other than Columbus Construction Company, to engage in, a strike or concerted refusal in the course of their employment, to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services where an object thereof is to force or require any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of or to cease doing business with Columbus Construction Company, *or with any other employer or person.*' (Emphasis by the Court).

"A 'broad order' was not requested in the pleadings, at the hearing, in argument, or in briefs before the Trial Examiner. The Trial Examiner recommended the usual order requiring the Union to cease and desist from inducing secondary employees to strike or to refuse to handle goods where an object is to force anyone to stop doing business with Columbus, the primary employer. The Board attempts to justify the breadth of its order on the ground that 'the Respondent has engaged in similar violations in respect to other employers in the area * * * (and) it can be reasonably expected that the Respondent will continue to commit similar violations in the future.' The alleged 'similar violations' were two Campbell Coal cases. (Footnote omitted).

"At the trial of the case, the government introduced no evidence relating to any other instances of alleged violations by the Union showing a statewide or area-wide policy of engaging in secondary boycotts. No mention was made of the Campbell Coal cases. * * * As a matter of fact no evidence was taken in those cases upon which the Board could base a determination as to whether the Union had violated the Act. The Campbell Coal cases were terminated without prejudice by a 'Settlement Stipulation' containing a provision that the Union 'does not admit it has committed the acts or has engaged in the unfair labor practices alleged in the consolidated complaint'. (Footnote omitted).

"Section 10(c) of the Act expressly authorizes the Board, upon finding an unfair labor practice, to enter an order requiring the offending

IV

THE WORDS "OR ANY OTHER EMPLOYER" IN THE BOARD'S ORDER AS ENFORCED BY THE COURT, WITHOUT ANY GEOGRAPHIC LIMITATION AND WITHOUT ANY EXPRESSION IN THE COURT'S DECREE DELIMITING THE EFFECT OF ITS INJUNCTION, CONSTITUTE THE COURT OF APPEALS A COURT OF FIRST INSTANCE FOR THE TRIAL OF UNFAIR LABOR PRACTICES.

With, or without, a consideration of the orders of the Board based upon compromise settlement in the *Indiana Bell* and *Southern Bell* cases, the words "or any other employer" constitute the Court of Appeals a court of first instance for the trial of future unrelated unfair labor practices.

(a) Local 4372 was not even a party to the Settle-

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party 'to cease and desist from such unfair labor practice, and to take such affirmative action * * * as will effectuate the policies of this Act.' This is broad language. But it imposes a corresponding responsibility not to issue a broad order without the record to support it.

"In this case the order is designed to protect not only the employers doing business with Columbus Construction Company but 'any other employer or person.' There is nothing in the record to justify any such broad coverage. To find support for its order, the Board must go beyond the record, to the Campbell Coal cases, and, in effect, repudiate the stipulation solemnly entered into by the Board.

"We are aware of the considerations supporting a broad grant of discretion to the Board in determining the proper remedy for a violation of the Act. We consider more important, and basic to a fair administration of the Act, the hard-won principle of Anglo-American law that a judgment or order must find adequate support in the record. An order of a court or federal agency that goes beyond the record to penalize an offender as a bad actor smacks too much of attainder to be acceptable to this Court. We are committed to a narrower view of the proper scope of orders that may furnish the basis for contempt proceedings. *NLRB v. Ford Motor Co.*, 5 Cir., 1941, 119 F.2d 326, 8 LRRM 656; *NLRB v. Dallas General Drivers, etc., Local 745*, 5 Cir., 1956, 228 F.2d 702, 37 LRRM 2356; *Truck Drivers Local Union 728 v. NLRB*, 5 Cir., April 8, 1959, 265 F.2d 439, 43 LRRM 2813. On this issue we are in general agreement with *International Brotherhood of Teamsters, etc. v. NLRB*, U. S. App. D.C. 1958, 262 F.2d 456, 43 LRRM 2198 and *National Labor Relations Board v. Cleveland-Cliffs Iron Co.*, 6 Cir., 1943, 133 F.2d 295, 12 LRRM 550. See also *NLRB v. Express Publishing Co.*, 1941, 312 U. S. 426, 61 S. Ct. 693, 85 L. Ed. 930, 8 LRRM 415.

"Accordingly, we modify the order of the Board by deleting the phrase of the first paragraph: 'or with any other employer or person.' As modified, we grant enforcement of the order." *NLRB v. Local 926, Int. Union of Operating Engineers, AFL-CIO*, 267 F.2d 418, 420, 44 LRRM 2200 (CA-5, 1959).

ment Stipulations nor a Respondent to the Order of the Board in the *Indiana Bell* and *Southern Bell* cases which the Board contended could be used against it. There was no evidence in the record in this case that any employees, other than those working for Ohio Consolidated, were, or could have been, restrained or coerced in the exercise of their rights under Section 7 of the National Labor Relations Act, as amended. The fact that employees of other employers, not involved in the labor dispute, may have heard of improper conduct engaged in by members of Local 4372, would be immaterial unless it were shown that they were asked to perform work for Ohio Consolidated during the strike and thereby become its employees. Absent these circumstances, which do not appear in the record, the Section 7 rights of employees other than those working for Ohio Consolidated were not involved in the strike.

The operations of Petitioner Local 4372 are confined to a part of the State of Ohio and to the representation of the employees of only one employer — Ohio Consolidated. An injunction, the scope of which extends beyond the geographical area of its operations, can be construed to render Local 4372 responsible for the acts of other CWA affiliated local unions under some circumstances. The Decree of the Court, which applied to the restraint and coercion of the employees of Ohio Consolidated "or any other employer," regardless of location, invites the trial in the Court of Appeals of allegations of initial labor act violations. Thus, the Court, unless the effect of its decree is delimited by appropriate language, legally can be asked to adjudicate complicated factual questions of agency involving the alleged responsibility of Local 4372 for acts of

other CWA local unions in widely divergent geographical areas. This Court has already held in *Express Publishing Company, supra,* and *May Department Stores, supra,* that it was not the intention of Congress that the initial determination of such factual questions should be vested in the Courts of Appeal. A " 'Court of Appeals should not become a labor court of first instance by virtue of its contempt powers.' *International Brotherhood of Teamsters v. NLRB,* 262 F. 2d 456, (CA, D.C. 1958)." *Morrison Knudsen, Inc. v. NLRB,* 270 F 2d 864, 44 LRRM 2680, 2681 (CA-9, 1959).

It must also be said that the decision of the Board in this case and its contention in its brief in the Court of Appeals, that employees of other employers may have heard of such conduct and that Section 8(b)(1)(A) was thereby violated, seeks to make a mere police statute of the Act, and mere police magistracies of the Courts of Appeal if they are authorized to determine initial Labor Act violations. Congress, in enacting the Labor Act, left to the states primarily the police function of controlling violence. *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, ... S. Ct. ....., 43 LRRM 2838. The Act seeks to protect the right of employees to abstain from concerted activity, that is, to work during a strike. It makes no proscription against violence, eo nomine, but only against those particular types of conduct (violence may, or may not, be the instrument) which restrain or coerce employees *in the exercise of* Section 7 rights. 25 U.S.C., Supp. V, 158(b)(1)(A); NLRA, Section 8(b)(1)(A), App. A, p. 2a.

Without evidence in this case that employees, other than those of Ohio Consolidated, were restrained or

coerced in their rights, a decree as to such employees of other employers can only be designed to control violence, or threats of violence, in vacuo, which is a police function remaining to the states.

(b) As to the Communications Workers of America, AFL-CIO, there was no pleading, allegation, evidence or finding *in this record* that violence and threats were, or are, an habitual course of conduct or normal pattern of its operations. The Board did not so find and there is no factual basis in the record for such a finding.

In an effort to supply this deficiency in the Court of Appeals, Counsel for the Board injected into their brief the *compromise* settlements in two isolated CWA labor board cases, although there is no indication that the Board considered these cases in formulating its order.

Since CWA made no admissions of guilt in those cases and since the Board made no findings or conclusions of guilt in them, a conclusion that CWA is "in general opposition to the purposes of the Act," as contended for by the Board before the Circuit Court, should not be based upon such privileged actions.

Even if the law permitted this to be done in the abstract, such would be improper under the facts shown by the Settlement Stipulations themselves. Each of the Settlement Stipulations provided a direct remedy by court enforcement if the Board found that CWA had failed to comply with the terms of its agreement. In the *Indiana* case, there has never been any contention that CWA has not fully complied with its agreement and the Board Order. In the *Southern Bell* case,

Southern Bell attempted to instigate court enforcement against CWA when one of the local unions party to the agreement breached the compromise settlement. This application of Southern Bell was adjudicated by the Board's General Counsel concurrently with his application, on behalf of the Board, for enforcement of its Order in the present case. On the motion for Court enforcement of the *Southern Bell* case, the Board's General Counsel declined to institute legal proceedings, finding:

> "At the inception of a nation-wide strike called against the company, the International Union warned its local unions against engaging in violence or other misconduct. These warnings were heeded by all local affiliates, except one whose strike activity at the company office within its jurisdiction was marked by mass picketing and other misconduct. The misconduct occurred despite the determined efforts of an International Representative to prevent it. On the complaint of the International Representative, the Local Union official responsible for the misconduct was removed from offiice at the conclusion of the strike. The strike lasted only four days and was entirely peaceful at all other company locations throughout the country." (*General Counsel's Administrative Rulings*, Case No. S-739, November 27, 1958, 43 LRRM 1237).

The findings of the Board's highest authorized agent in the above quotation are, to say the least, inconsistent with the contentions of the same agent made before the Court of Appeals in this case when he contended that misconduct of members of *one out of three* CWA local unions engaged in the Ohio Consolidated strike reflect a "general opposition to the purposes of the Act" on the part of CWA itself.

Irrespective of the inconsistency of these contentions, these circumstances are a potent signal of the dangers inherent in the broad scope of the Court's Decree and are a clear indication that it is entirely possible that the Court, in future contempt proceedings, would be asked to determine that CWA has violated the Court's decree in this case because the members of an affiliated local union in another geographical area have, possibly because of incitation by irresponsible local union officers, engaged in acts or threats of violence.

The Communications Workers of America is a nation-wide association, having approximately 260,000 individual members, approximately 730 affiliated local unions, and contractual relations with almost 100 employers. It represents and deals with the employees, not only of these employers, but also of other employers whose employees are being organized. It seems improper that CWA should have been held responsible for the acts of the members of one local union engaged in the strike against Ohio Consolidated, when the members of two other local unions engaged in the same strike were not shown to have engaged in any improper conduct. However, the Board's Order and the Court's Decree takes the position that CWA was responsible, derivatively, for the acts of the members of this local union because it approved the strike and provided financial assistance. This same legal argument of the Board (having been approved by the Court in its Decree and being carried forward into contempt proceedings) would authorize the Court of Appeals to punish CWA for a myriad of acts and circumstances differing from those in the present case and involving different employers and the members of different local

unions. CWA is not an omnipotent presence with the ability to prevent violations by 730 virtually autonomous local unions.

Congress did not intend that the Court of Appeals should try initial Labor Act violations; however, the Court's decree, presumably, without any language of limitation, covers the employees of every one of the employers with whom CWA deals, as well as all other employers in the United States, no matter where located. Under its Decree, the Court of Appeals for the Sixth Circuit, as a court of first instance, can adjudicate all of the issues of fact involved in the actions of an affiliated union in Seattle, Washington, and determine whether an unfair labor practice occurred, whether it was merely an isolated instance, and whether CWA was responsible therefor on vicarious principles.

The Act contemplates that CWA would be entitled to an initial determination of such complicated factual issues by the designated trier of the facts—the Labor Board—without being confronted, in the first instance, with the onerous prospect of being held in contempt of a Court of Appeals.

CONCLUSION

For the reasons stated, it is respectfully submitted either that the Court of Appeals should be instructed to issue a definitive decision limiting the future application of its decree to employees of employers within the geographical area of operation of Local 4372;[19] or, preferably, that the words "or any other employer" should be ordered stricken from the Board's Order as enforced by the Court of Appeals.

Respectfully submitted,

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[19] As was done in *Central States Drivers Council v. NLRB*, 267 F.2d 163, 44 LRRM 2058 (CA-D.C., 1959).